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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

vs.

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE
and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

BRIEF OF APPELLEE, STATE OF WISCONSIN

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BRIEF OF APPELLEE, STATE OF WISCONSIN

QUESTION PRESENTED

The State disagrees with the appellants' statement of the question presented.

The question presented is whether the State may, consistent with its long-established constitutional power to regulate the integrity of the electoral process to advance the interests of its citizens, choose to enable Democratic voters in a presidential primary election to

select their party privately and without a public declaration of party loyalty.

The State cannot agree with the appellants' statement of the second question. Appellants, hereafter collectively the "National Party," state the second question to be whether the State can prevent the National Party from determining the qualifications of delegates to its national convention.

The reason this second issue is not presented is that the "Wisconsin statute explicitly states that '[t]he method of selecting the delegates or alternates shall be determined by the state party organization.' Sec. 8.12 (3) (b), Stats." *State ex rel. La Follette v. Democratic Party,* 93 Wis. 2d 473, 485, 287 N.W.2d 519, 523 (1980), Appendix of Appellant at 6a (hereinafter A-Ap.). The Wisconsin law "does not govern the selection of or qualification of delegates to the national convention." 93 Wis. 2d at 525, 287 N.W.2d at 542, A-Ap. at 41a. Indeed, the parties stipulated that delegate selection "is under the control and direction" of the Democratic Party of Wisconsin (hereinafter the "State Party"). Stip., par 19, Joint Appendix at 27 (hereinafter Jt. App.).

STATEMENT OF THE CASE

What characterizes the Wisconsin system as an "open" primary is that the "voter is not required to declare publicly a party preference or to have that preference publicly recorded. Each voter makes a choice of party in the privacy of the voting booth." 93 Wis. 2d at 485, 287 N.W.2d at 523, A-Ap. at 6a.

The Wisconsin voter votes for candidates, not delegates. The State Party chooses the delegates after the primary. The sole function of the primary is to apportion the number of delegates among the Party's candidates in accord with the results of the primary. 93 Wis. 2d at 485-86, 287 N.W. 2d at 523-24, A-Ap. at 6a-7a.

The National Party's Rule 2A provides that "Democratic voters only who publicly declare their party preference and have that preference publicly recorded" may participate in the "delegate selection process." A-Ap. at 8a. In July, 1979, the Compliance Review Commission of the National Party rejected the delegate selection plan of the Democratic Party of Wisconsin because "participation in the April 1, 1980 Wisconsir presidential preference primary is not restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded," and the State Party had presented no alternative. Stip., par. 14, Jt. App. at 25, 93 Wis. 2d at 489, 287 N.W.2d at 525.

Under National Party rules, no Wisconsin delegation was to be seated at the national convention unless in compliance with Rule 2A. Stip., pars. 11, 17, Jt. App. at 25, 26.

The State commenced this action as an original action before the Wisconsin Supreme Court. The State named both the National Party and the State Party as respondents. The State Party responded by agreeing that State law validly may be applied against it and the National Party. The State Party cross-claimed against the National Party, asking the court to order the National Party to recognize its delegation selected in accord with Wisconsin law. The National Party defended on the ground that the Wisconsin law offends the first and fourteenth amendments to the United States Constitution.

The Wisconsin Supreme Court, after receiving briefs, hearing oral argument, and reviewing the parties' stipulated facts, entered its decision and judgment on January 19, 1980. It concluded that the National Party had failed to show that its requirement of a public declaration of Party affiliation served to

keep non-Democrats from participating in the Democratic primary. "Both the closed and open primary depend on the honesty and integrity of the voters." 93 Wis. 2d at 510, 287 N.W.2d at 535, A-Ap. at 27a-28a. The National Party's own evidence showed there are no differences in results or representativeness in open as opposed to closed primaries. 93 Wis. 2d at 507-08, 287 N.W.2d at 534, A-Ap. at 25a-26a. Since the required public declaration of Party loyalty only deters voting, the court concluded the essential difference between Wisconsin's open primary and a closed primary is that in the former more people vote on the ballot of their party, not that more non-Democrats vote on the Democratic ballot. 93 Wis. 2d at 511-12, 287 N.W.2d at 535-36, A-Ap. at 29a.

As a result, the court concluded that the open primary law, by granting voters a right of privacy in party selection, does not impose a substantial burden on the associational rights of the National Party, and that any burden "appears speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d at 536, A-Ap. at 29a.

The court also found that the State has a compelling interest in maintaining its open primary even if there were a substantial burden on the National Party's associational freedoms. The State's interest, the court said, is to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner. 93 Wis. 2d at 512, 287 N.W.2d at 536, A-Ap. at 30a. The interest of privacy of the ballot is "'fundamental in a free society.'" 93 Wis. 2d at 512, 287 N.W.2d at 536, A-Ap. at 30a. Voting is encouraged, which in turn fosters democratic government. 93 Wis. 2d at 512-13, 287

N.W.2d at 536, A-Ap. at 31a. Further, a public declaration would interfere with the State's entire electoral system which is based on secrecy of the ballot and non-disclosure of party preference in the case of hundreds of partisan and nonpartisan offices in the state. 93 Wis. 2d at 513-14, 287 N.W.2d at 537, A-Ap. at 31a-32a. And the open primary is deeply engrained in Wisconsin traditions and culture: for almost the whole of the 20th century it has "functioned well in the state of Wisconsin for the citizens and for the political parties." 93 Wis. 2d at 514, 287 N.W.2d at 537, A-Ap. at 32a.

Having concluded that the open primary law is constitutional, the court turned to a remedy. Unlike the situation in *Cousins v. Wigoda,* 419 U.S. 477 (1975), the Attorney General and the State Party "are not arguing that the National Party must seat any delegates selected by the State Party in accordance with Wisconsin law." Rather, they sought an order that the National Party "cannot refuse to seat the Wisconsin delegation on the sole ground that the delegation was apportioned by utilizing the results of a primary in which no public declaration of party preference was required." 93 Wis. 2d at 552, 287 N.W.2d at 541, A-Ap. at 38a-39a. The court entered judgment accordingly. 93 Wis. 2d at 525-26, 287 N.W.2d at 543, A-Ap. at 42a.

SUMMARY OF ARGUMENT

Two interests fundamental to our system of federal government are at issue here. The first is the authority of the states conferred by the United States Constitution article II section 1: "Each state shall appoint, in such manner as the legislature thereof shall direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled."

This authority is "plenary," *McPherson v. Blacker,* 146 U.S. 1, 35 (1892), and "extensive." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968). The states' authority to determine the process of selecting electors has been recognized to include essential steps in that process. Thus, primary elections are an "integral part of the entire election process." *Storer v. Brown,* 415 U.S. 724, 735 (1974). The states' authority extends to the registration and qualification of voters as well as to the selection and qualification of candidates.

Further, the states are free to choose to exercise this authority to restrict or expand access to candidates and voters within broad limits.

> [A]ppellants ... assert that ... substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. These cases, however, do not ... invalidate[] every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters .... Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of

> voters, and the selection and qualification of candidates.

Storer v. Brown, 415 U.S. at 729-30.

Thus, although this Court has had occasion to review only restrictions on candidate and voter access, the explicit constitutional authority vested in the states to preserve the integrity of the voting process and secure the rights of its citizens sanctions "substantial" regulation either to restrict or expand voter access.

Wisconsin has exercised its authority to expand voter access by guaranteeing voter privacy in the presidential primary.

The second interest at issue is the National Party's interest in controlling its internal affairs. That interest simply is not threatened in this case. First, the process of delegate selection under Wisconsin law is under the exclusive control of the Democratic Party. Stip. par. 19, Jt. App. at 27. The sole function of the Wisconsin Open Primary Law is to determine Democratic candidate strength among persons who vote Democratic. Thus, this case concerns only the unique public function of the National Party in selecting a person likely to be President in an essential part of the presidential selection process: it is a voting rights case, not a delegate selection case.

This is the "significant fact" that shaped this Court's analysis in *Cousins v. Wigoda,* 419 U.S. 477, 489 (1975), and distinguishes the instant case. In *Cousins,* "suffrage was exercised at the primary election to elect delegates to a National Party Convention." *Id.* However, as noted, under Wisconsin law *no* delegates are selected by Wisconsin voters. Thus, the National Party's interests affected and the weight to be accorded those interests are other than those discussed in *Cousins.*

Second, the National Party has not demonstrated that any of its own legitimate interests are burdened by Wisconsin's Open Primary Law. It has no valid constitutional interest in excluding principled supporters of a Democratic Party candidate on the basis that the supporter has previously, or ever, supported other or no party candidates. Further, there is no factual support for the National Party's fear of unprincipled votes for its candidates, *i.e.*, raiding. The evidence is clear: there is none.

The National Party has made no showing of anything more than a speculative burden on its associational interests. At most, Wisconsin's Open Primary Law requires a demonstration of a rational basis. *Storer v. Brown,* 415 U.S. 724 (1974). This is particularly so where there is an explicit grant of authority to the state to regulate concerning the subject matter. *See, Pruneyard Shopping Center v. Robins,* — U.S. —, 100 S. Ct. 2035, 2040 (1980).

Wisconsin's interests not only are valid, they are compelling. Most importantly, by choosing not to require a public declaration of party affiliation, Wisconsin stimulates public participation in the process of choosing a President. This guarantee of privacy of ballot in party selection as well as candidate selection recognizes the interests of formal Democratic Party members as well as all voters in privacy of association. Further, Wisconsin's system of strictly local and non-partisan contests at its spring election is served by excluding a separate partisan declaration and partisan voting procedure.

Recognizing Wisconsin's authority to guarantee the privacy of the vote would not disrupt the National Party's continuing efforts to broaden its base of delegate representation. As noted, *no* rule related to individual delegate selection is at issue here. The Party

selects the delegates and is free to develop or abandon rules on that subject.

Finally, Wisconsin has no alternative means available to guarantee privacy of voting association short of the guarantee embodied in its open primary. To effectuate the will of its citizens, it could do no less.

ARGUMENT

I. States Are Vested With Broad Discretion By Article II Section I Of The Constitution To Determine Who May Vote In Presidential Primaries.

This case concerns the power of the state to guarantee voting privacy in a presidential primary. Each state is vested by article II section I of the Constitution/[1] with the authority to determine voter qualifications and the procedure whereby its citizens choose presidential electors. "The right to vote ... protected [is] the right to vote as established by the laws and constitution of the state." *McPherson v. Blacker,* 146 U.S. 1, 39 (1892); *Cousins v. Wigoda,* 419 U.S. 474, 495 (1975) (Rehnquist, J., concurring).

"There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968). Thus, a state's role in our federal/[2] system has been

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/[1]"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress." U.S. Const. art. II sec. 1.

/[2]A state's authority vested by article II sec. 1 (selection of presidential electors) and article I sec. 2 (selection of members of

characterized as "under our Constitution ... States are given the initial task of determining the qualification of voters." *Storer v. Brown,* 415 U.S. 724, 729 (1974). This power extends as well to the "registration and qualification of voters and the selection and qualification of candidates." *Id.* at 730. It is, therefore, the state's prerogative to determine how it exercises its discretion to afford its citizens the degree of access it deems proper./[3]

The state's power is no less extensive in a presidential primary. "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States,* 256 U.S. 232, 286 (1921) (Mr. Justice Pitney, dissenting in part). *Cf. Cousins v. Wigoda,* 419 U.S. at 495 (concurring opinion). "The direct party primary ... is not merely an exercise or warm-up for the general election but an integral part of the entire election process." *Storer v. Brown,* 415 U.S. at 735. This Court expressly has acknowledged the power of the states to regulate voting in primaries to preserve the integrity of each state's legislatively determined interests. *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. den.* 411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

Although these principles of our system of government have frequently and pointedly been recognized by this Court,/[4] appellants attempt to ignore their

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congress) has been treated as having similar contours. *See, e.g., Storer v. Brown,* 415 U.S. 724, 730 (1974); *Marchioro v. Chaney,* 442 U.S. 191, 196 (1979).

/[3]A state is free to choose to abolish popular election and use some other method for picking a president. *McPherson v. Blacker,* 146 U.S. 1, 35-36 (1892).

/[4]*See, e.g., Kusper v. Pontikes,* 414 U.S. 51, 57 (1973); *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. den.* 411 U.S. 959 (1973); *Bullock v. Carter,* 405 U.S. 134, 141 (1972); *Gray v. Sanders,* 372 U.S. 368, 379 (1963); *United States v. Classic,* 313 U.S. 299, 311

import by asserting two propositions: first, that this Court in *Cousins v. Wigoda,* 419 U.S. 477 (1975), has "barred" the State of Wisconsin from implementing its open primary law, National Party's Brief at 19, and, second, that the impact of Wisconsin's law is so severe that its associational rights have been "struck to the core." *Id.* at 32. Appellees will respond to appellants' second proposition in section III of this brief. The first, because of the heavy reliance placed upon it by appellants and its fundamentally flawed premise, will be responded to here.

The critical distinction between the facts in *Cousins* and the instant case is that the selection of individual delegates to the National Party's convention was at stake in *Cousins*/[5] and is not at stake here. In *Cousins* the National Party and this Court were properly concerned that persons who write the platform, vote on party structure and procedure as well as represent the interests of the voters in myriad parochial and national matters be only Party members chosen by only Party members and not mandated by statute or court order to be seated at a party's convention. None of these concerns, contrary to the assertions of appellants, are validly raised in the instant case.

All the essential facts determining the selection of delegates have been stipulated to by the parties:

(1941); *Mason v. Missouri ex rel. McCaffery,* 179 U.S. 328 (1900); *In re Green,* 134 U.S. 377 (1890); *McPherson v. Blacker,* 146 U.S. 1, 28, 35-36, 39 (1892).

/[5]The "significant fact" that individual "delegates to a National Party Convention" (419 U.S. at 489) were selected in an election and were specifically subject to the Illinois court's injunction was frequently noted by the Court. *Cousins* concerns the "selection of delegates to the National Party Convention." *Id.* at 491.

> Under *both* the Open Primary Law and the alternative caucus plan pursuant to the rules of the DNC: (1) the process for selecting the delegates is under the control and direction of the State Party; (2) only Democrats and those who subscribe to the general progressive principles of the State Party may participate in selecting delegates; and (3) a committed delegation results, *i.e.*, delegates to the National Convention are bound to support a particular candidate.

Stip. par. 19, Jt. App. at 27.

That *Cousins* was a delegate selection case which was decided on considerations related to intruding into that process is patent. That this case does not involve that central issue has, literally, been stipulated by all parties.

Appellants' error is compounded by casting the relief afforded by the court below as "more intrusive" than the order at issue in *Cousins*. It is not. In *Cousins* the state court had enjoined nonelected delegates from so much as asserting their delegate status before the convention, notwithstanding the Court's conclusion that election of delegates under Illinois law did not entitle the elected person to be seated. 419 U.S. at 488. The Wisconsin Supreme Court narrowly tailored its relief to prevent any misrepresentation of its citizens by ordering that no one may be "disqualified as [a delegate] solely by reason of the apportionment ... as required by the Wisconsin statutes." 93 Wis. 2d at 526, 287 N.W.2d at 543, A-Apee. at 42a./[6]

/[6]As Mr. Justice Powell stated in concurrence and dissent in *Cousins v. Wigoda*, 419 U.S. 477, 497 (1975), states have power to enjoin persons from sitting as delegates representing districts in the state.

Appellants reveal their claim to absolute power, to the exclusion of any other interests no matter how legitimate, by their claim that the Wisconsin Supreme Court's relief sorely intrudes on their prerogatives. Assume Wisconsin had a law saying the state and national parties may not refuse to seat a delegate because of his or her race or sex. The logical result of appellants' position is that *Cousins* forecloses such "intrusion." *Cousins*, however, did not foreclose all state regulation. It foreclosed a particular regulation, namely, undue interference with the choice of delegates.

Given these distinctions, it is proper first to analyze the state's authority to regulate elections before examining the minor effect Wisconsin law has on the National Party's private associational activities.

II. A State Is Free To Exercise Its Article II Section I Authority To Guarantee Access To Both Public And Private Party Identifiers.

The National Party appellants assert that their interests are paramount and argue to this Court that state primary laws must either protect their interests or fall. This critical and essential thesis of the National Party is invalid. They proceed from the assumption that any interference with their asserted interests may be sustained only if a "compelling state interest" is demonstrated. National Party Brief at 19. In fact the National Party neither possesses the interests claimed nor is entitled to require a compelling state interest to sustain the state's primary regulatory laws. A proper legal analysis is possible only once it is understood that the National Party's interests are not absolute. Further, upon proper definition of the

National Party's interests and consideration of competing interests, it will be apparent that Wisconsin citizens have the authority to choose to conduct their state's primary election as they have for over seventy-five years.

At the outset it is important, therefore, carefully to define the interest the National Party actually represents and those it seeks to adopt for purposes of this proceeding. The National Party in the instant case is selecting a candidate for President of the United States. *No other function* of the Party is at issue. Platform writing, party structure and procedure as well as political strategy are all exclusively in the hands of persons who must be Party members selected by Party members. *See,* Wis. Stats. sec. 8.12 (3) (b)/[7]; Stip. par. 19, Jt. App. at 27. It is only this national public funciton of one of the two major political parties that is at issue. This is a critical distinction between the instant case and *Cousins v. Wigoda,* 419 U.S. 474 (1975). To distinguish and identify this single function of unique character at issue it will be referred to herein as the National Party's unique public function.

The National Party is not simply a "private club." 93 Wis. 2d at 515, 287 N.W.2d at 538, A-Ap. at 33a. Its interest is not, therefore, that of the National Association for the Advancement of Colored People struggling to carve out an identity and awaken the conscience of a nation. It is true that both the NAACP and the National Party are organizations seeking funds, building coalitions, resisting opposition, and pursuing organizational goals. *Cf. NAACP v. State of Alabama,* 357 U.S. 449 (1958) (cited by National Party at 18). The NAACP does not, however, at a single

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/[7]Wisconsin statutes sec. 8.12 (3) (b), provides in relevant part: "The method of selecting the delegates ... shall be determined by the state party organization."

meeting every four years select a person who is likely by virtue of his or her selection to be the next President of the United States.

Cases therefore which foster and protect exclusively private associations in their internal and often parochial activities are not apposite. The private functions of the National Party are not threatened or at issue.

That the unique public function of the National Party constitutionally requires greater governmental supervision is a concept of fundamental importance to twentieth century constitutional law. To the extent that an otherwise private entity performs a function that participates in or shares the governmental function of the state, its actions are thereby circumscribed by constitutional principles and may be regulated to that end./[8] Rights stemming from private ownership of property/[9] to first amendment exercise/[10] are subject to this principle depending on the circumstances of the action taken. Therefore, far from precluding any state regulation, the National Party's acts performed as they are at the very heart of the process of representative government are to that degree subject to appropriate regulation.

/[8]*See generally,* the *White Primary Cases: Nixon v. Condon,* 286 U.S. 73 (1932); *Smith v. Allwright,* 321 U.S. 649 (1944); *Terry v. Adams,* 345 U.S. 461 (1953, *reh. den.* 345 U.S. 1003 (1953). *See also, State of Georgia v. National Democratic Party,* 447 F.2d 1271, 1275 n. 5 (D.C. Cir. 1971), *cert. den.* 404 U.S. 858 (1971); *Nixon v. Herndon,* 273 U.S. 536 (1927).

/[9]*See, e.g., Marsh v. Alabama,* 326 U.S. 501 (1946).

/[10]*Marchioro v. Chaney,* 442 U.S. 191, 196 (1979). *See also, Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969); *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973).

Appellants turn these well-known principles on their head to say that because they perform such a critical part in the public's business they are beyond regulation by government. More particularly, they turn to this Court's own language in *Cousins v. Wigoda* to say that the first amendment associational freedoms immunize the process of selecting a candidate from governmental intrusion.

The majority's language in *Cousins* simply cannot bear the weight appellants would put on it. The language at most is *obiter,* this Court having expressly narrowed the issue to the question of delegate selection. 419 U.S. at 483 and n. 4. *See, Fallon v. St. Bd. of Elections of St. of New York,* 408 F. Supp. 636, 638, and n. 3 (S.D. N.Y. 1976). Second, this Court subsequently has so confined *Cousins* in language recognizing the power of the states to regulate the political parties because of the overriding public interest in electoral integrity. *See, Buckley v. Valeo,* 424 U.S. 1, 24, 25 (1976). Most recently, in *Marchioro v. Chaney,* 442 U.S. 191 (1979), this Court upheld state regulation of political parties in recognition of the "critical role played by political parties in the process of selecting and electing *candidates* for state and national office." *Id.* at 196 (emphasis added). *Cousins* was expressly distinguished as involving a state incursion into intraparty matters protected by freedom of association. *Id.* at 199. Finally, the language of the majority is overbroad, as the concurring Justices correctly noted.

Further, in asserting the interests of individual members of its organization, the National Party again asserts interests it does not possess and ignores contrary interests of equal weight and dignity. Clearly, a large number of citizens wish to associate and conduct their affairs in the manner the National Party does. Contrary to the Party's assertion, however, that

does not end the analysis. There are other groups of persons with competing interests who have the right to be heard. Constitutional law requires that their interests be considered.

The National Party concedes that its rule would exclude honest Republicans, Independents, minor party adherents, and those Democrats not wishing publicly to declare and have recorded that they were voting for a Democratic Party candidate in an election. Do these citizens have rights in the essential steps of the process of selecting the President? How are they to be considered and weighed and by whom? The National Party denies that these citizens have any rights and claims the unrestricted authority to set the terms of their participation in the primary process.

The facts are that non-major party adherents are increasing in number/[11] and are actively participating in the political process./[12] Conversely, publicly declared adherents of both major parties are a decreasing proportion of the American body politic./[13] The absolute number of citizens disenfranchised by the National Party rule and ignored in its legal analysis is the vast majority of the electorate, and the disproportion is increasing.

These facts are relevant not because the State of Wisconsin believes that more people aggregate to more

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/[11]The Gallup Opinion Index, Report No. 131, June, 1976, as reported in Comment, *Open vs. Closed Primaries: A Dilemma in the Illinois Election Process*, 1977 So. Ill. U.L. Rev. 210, 229; N. Nie, S. Verba and J. Petrocik, *The Changing American Voter* 47, 58 (Cambridge, 1976); G. Pomper, *Voter's Choice: Varieties of American Electoral Behavior 18-41 (New York, 1975).*

/[12]*Id;* W. Burnham, *Critical Elections and the Mainsprings of American Politics* 130 (New York, 1970).

/[13]*Id.*

rights, but because Wisconsin is free to choose/[14] and weigh the factors discussed *infra* in the context of the needs and practices of its citizens. As good public policy is debated, the practical context of actual voter sentiment may properly inform the Legislature and others vested with the responsibility to make such determinations.

The open primary is deeply woven into the fabric of Wisconsin's electoral processes. Nondisclosure of party preference extends to choosing presidential party candidates, partisan state and local candidates, and hundreds of nonpartisan executive, legislative, and judicial officers on the state and local level. 93 Wis. 2d at 514, 287 N.W.2d at 537, A.Ap. at 31a-32a. The local electorate is convinced of its abiding essential value. On September 5, 1979, by a unanimous vote of its senate and a 92-1 vote of its assembly, the Wisconsin Legislature by joint resolution reaffirmed the "firm and enduring commitment of the people of Wisconsin

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/[14] In the past the Court has upheld congressional actions designed to increase the overall level of political discourse but affecting adversely the First Amendment interests of some individuals. *Buckley v. Valeo, supra,* 424 U.S. 1, 64-68, 96 S.Ct. 612, 656-658, 46 L.Ed.2d 659 (1976) (disclosure requirements); *CSC v. Letter Carriers,* 413 U.S. 548, 564-566, 93 S.Ct. 2880, 2889-2891, 37 L.Ed.2d 796 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 392-395, 89 S.Ct. 1794, 1807-1809, 23 L.Ed.2d 371 (1969). In *Letter Carriers* we indicated specifically that the First Amendment freedoms of federal employees could be limited in an effort to further the functioning of the democratic process. I do not believe that local legislative judgments as to what will further the democratic process in light of local conditions should receive less weight than these congressional judgments. Surely that should be the case until we have a record, if one could be created, showing the fears of the ... [plaintiffs] to be justified.

Elrod v. Burns, 427 U.S. 347, 386 n. 9 (1976) (Burger, C.J., Powell, Rehnquist, J.J., dissenting).

to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy." Jt. App. at 75-78. And on September 14, 1979, a bill to create a modified closed primary was soundly defeated in committee. 93 Wis. 2d at 490, n. 14, 287 N.W.2d at 526, n. 14, A-Ap. at 10a.

For seventy-five years this state has conducted open primaries for president and for state and partisan offices. This tradition was born of conviction to stimulate popular participation to end boss rule, corruption, and fraudulent practices of parties. 93 Wis. 2d at 492-93, 287 N.W.2d at 527, A-Ap. at 12a.-13a. In calling for the adoption of a primary, Robert M. La Follette, Sr., argued that if the voter is competent to cast his ballot at the general election, " 'he is equally competent to vote directly at the primary election for the nomination of the candidates of his party.' " *Id.* Because conventions were thought to be susceptible to "manipulation by party leaders ... a widespread faith existed that more popular participation would have a cleansing effect on politics." V. Key, Jr., *Politics, Parties & Pressure Groups* 255 (5th ed. 1942). In 1897 La Follette said at the University of Chicago:

> Beginning the work in the state, put aside the caucus and convention. They have been and will continue to be prostituted to the service of corrupt organization. ... Go back to the first principle of democracy. Go back to the people. Substitute for both the caucus and convention a primary election — held under all the sanctions of law which prevail at the general elections — where the citizen may cast his vote directly to nominate the candidate of the party with which he affiliates, and have it canvassed and returned just as he cast it.

A.F. Lovejoy, *La Follette and the Establishment of the Direct Primary in Wisconsin* 35-36 (1941).

Clearly, the voters discouraged from voting or disenfranchised by the Party rule have individual interests in the outcome of the National Democratic Party's nomination process. Since a voter, "whether he be a registered Democrat or Republican, third party adherent or independent, is given alternative slates by the two major parties, he has a stake in the outcome of the nominating process of both parties." *Bode v. National Democratic Party,* 452 F.2d 1302, 1306 (D.C. Cir. 1971), *cert. den.* 404 U.S. 2019 (1972).

"The right to vote freely for the *candidate* of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964) (emphasis added). "The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." *Lubin v. Panish,* 415 U.S. 709, 716 (1974).

As the court below noted:

> Once the state provides a primary and makes the vote available to some persons, the right of all persons to vote becomes a basic one under the Constitution. *Rosario v. Rockefeller,* 410 U.S. 752, 764 (1973) (J. Powell dissenting, citing *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kramer v. Union School District,* 395 U.S. 621 (1969); *Carrington v. Rash,* 380 U.S. 89 (1965)). The United States Supreme Court has protected the voters' right to participate in a primary election from state laws imposing substantial burdens on the franchise. *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. denied.*

411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

93 Wis. 2d at 517-18, 287 N.W.2d at 539, A-Ap. at 35a.

Constitutionally, Wisconsin can stimulate public participation in the critical process of choosing a President. It has had signal success in this effort./[15] The rising number of unaffiliated voters undeniably warrants Wisconsin's encouraging them to affiliate privately with the parties at the primary. Unquestionably, Wisconsin can go farther than the Constitution commands in facilitating the opportunity for political associaton and candidate identification and support.

Recently this Court has recognized, in an area where there is a specific federal constitutional grant of authority, that certain precedent had not limited "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins,* — U.S. —, 100 S.Ct. 2035, 2040 (1980). The explicit authority conferred by article II section I of the Constitution of the United States in conjunction with article III section 1 of the Wisconsin

/[15]Wisconsin had the second highest percentage of voter age turnout in its 1976 primary of the twenty-four states conducting primaries. The increase in voter turnout for the general election was, however, the ninth smallest of the same group. A. Ranney, *Participation in American Presidential Nominations* 25 (Washington, D.C., 1977). One may fairly conclude that the Wisconsin Legislature has been extremely successful at matching its laws with the interests of its citizens to maximize primary voter participation.

Further, Ranney's statistics demonstrate that the states requiring the fewest indicia of party loyalty have the highest turnout rates: Wisconsin (2nd of 28), Oregon (1st), Montana (4th). *Id.* at 11, 25.

Constitution/[16] (for which there is no comparable federal constitutional provision) vests at least as much discretion in the Wisconsin Legislature in determining qualifications of voters in its presidential primary as was recognized in *Pruneyard.*

Lastly, the National Party advances several policy arguments that indicate the true nature of the controversy. They propose that someone's (theirs, an association of political scientists, the "national") interest is served by strong parties and that their own efforts, represented by their exclusionary rule, therefore represent good public policy. Brief of National Party at 27, n. 20. Such reliance on one concept of a National Party's proper role reveals that this dispute is primarily one of policy rather than one of law.

There is, of course, no mention in the Constitution of political parties and, indeed, evidence that the power held by today's major parties would have been foreclosed had it been foreseen./[17] The theoretical and

/[16]Every person of the age of ... [18] years or upwards, belonging to the following classes ... shall be deemed a qualified elector at such elections:

(1) Citizens of the United States.

/[17]"Partisan politics bear the imprimatur only of tradition, not the Constitution." *Elrod v. Burns,* 427 U.S. 347, 369, n. 22 (1976).

> When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and form of popular government, is then the great objective to which our inquiries are directed. ... In an equal degree does the increased variety of parties, comprised within the union increase this security.

The Federalist No. 10 (J. Madison) 44 (Oxford, 1948).

political debate on the virtues of strong/weak/two/multiple party systems is ongoing. It is a debate that touches upon the fundamental concepts of democracy as well as the lifeblood of our evolving, increasingly technological society. The debate has no single, static, deductive answer based on law, social policy or majority vote. That is why, at least as they relate to the franchise in presidential primaries, such matters were entrusted to the several states by the framers of our Republic so that various appropriate answers may be found based on the individual state's choice./[18] The importance of the function performed, the impact on non-party-declaring voters' rights, the fundamental representational nature of the question presented all must be balanced only by carefully weighing the facts and cannot be determined/[19] by simplistic statement of the words "first amendment associational rights" as the National Party has asserted.

/[18]In reviewing a state's electoral legislation this Court should not "[fail] to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them." *Kusper v. Pontikes,* 414 U.S. 51, 63 (1973) (Blackmun, J., dissenting).

/[19] [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," Dunn v. Blumstein, *supra,* 405 U.S., at 348, 92 S.Ct., at 1006, very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, *supra,* 393 U.S., at 30, 89 S.Ct., at 10; Dunn v. Blumstein, *supra,* 405 U.S., at 335, 92 S.Ct., at 999. What the result of this process will be in any specific case may be very difficult to predict with great assurance.

Storer v. Brown, 415 U.S. at 730.

Wisconsin, as are all states,/[20] is free to choose/[21] to open or close its primary.

III. Wisconsin's Open Primary Law Does Not Abridge The Interests Of The National Party.

The choice made by the citizens of the State of Wisconsin three quarters of a century ago, to recognize in the presidential selection process the associational interests of those who wish to vote without publicly declaring their party preference, is entitled to considerable constitutional deference. *See* sec. I, *supra.* As demonstrated below, the burden of Wisconsin's law on the National Party is not significant and its interests not impaired to the degree necessary to overcome the state's article II section I authority.

/[20]"The question before us is not one of policy but of power ....

[We cannot] recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

....

[T]he authority vested in the legislatures by the second clause of section 1 of article II has [not] been divested ...."

McPherson v. Blacker, 146 U.S. 1, 35-36, 40 (1892).

A state may legislate to prevent the perceived evils of crossover voting, *e.g., Rosario v. Rockefeller, supra,* but several states permit crossover voting in their primaries which allow participation by independents and members of

> The National Party has the duty of persuading us that this is a situation in which a state statute significantly infringes the National Party's associational rights. *Marchioro v. Chaney,* 442 U.S. 191, 99 S. Ct. 2243, 2248 (1979). *See also, American Party of Texas v. White,* 415 U.S. 767, 790 (1974). The discussion of substantial burden in this case must focus on whether the open primary law significantly impedes the National Party as it seeks to achieve its stated purposes and objectives.

93 Wis. 2d at 498-99, 287 N.W.2d at 530, A-Ap. at 18a.

Once it has been determined that a substantial restriction or burden has been imposed, the Court then weighs the state's countervailing interests in the proper factual and constitutional context. In the instant case, the National Party, standing alone, cannot demonstrate that any legitimate interest of its own has been more than incidentally burdened. This conclusion was reached by the Wisconsin Supreme Court below after thoroughly and carefully reviewing

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other parties. There is no suggestion that such a clause makes the election laws unconstitutional, nor is it a mandatory prerequisite to constitutionality that independent, non-member electors be permitted to vote in a party's primary. The Connecticut General Assembly has adopted statutes governing political party primaries which it considers best meet the needs of the State. The laws are not invidiously discriminatory but apply to all alike. The legislatures of "[t]he states have broad discretion in formulating election policies." *Tansley v. Grasso,* 315 F. Supp. 513, 519 (D. Conn. 1979) (three-judge court), citing *Williams v. Rhodes,* 393 U.S. 23, 34, 89 S.Ct. 5, 21 L.Ed. 2d 24 (1968).

Nader v. Schaffer, 417 F. Supp. 837, 850 (D. Conn. 1976), *aff'd mem.,* 429 U.S. 989 (1976).

/[21]"A State need not take the course California has ...." *Storer v. Brown,* 415 U.S. 724, 736 (1974).

the applicable facts and law. 93 Wis. 2d at 499-511, 287 N.W.2d at 530-36, A-Ap. at 19a-29a. In order not to simply repeat that persuasive analysis, appellee submits it forcefully speaks for itself and offers only certain points for emphasis here.

The chief interest advanced by the Party and recognized by the commentators has been expressed as preserving the effectiveness or integrity of a vote of its members by preventing its dilution by others inappropriately participating in the process. This is the chief, and, it is submitted, only substantial rationale for the National Party's rule.

Because of the misleading use of terms and data by the National Party, some clarification is necessary. Voters who vote for a candidate who have previously not been affiliated or have been affiliated with another party are generally referred to as "crossovers." Those who crossover in order to give support to the candidate have been referred to as "genuine" or "principled" crossovers. Those who do so in order to impose on an opposing party a weaker candidate are generally referred to as "raiders."/[22]

Appellees submit there is no substantial interest held by the National Party alone that would justify preventing principled supporters of a national candidate of its party/[23] from voting for him or her in an

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/[22]"Raiding" has been defined by this Court as "the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results." *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973).

/[23]The process of ballot access in the Wisconsin presidential primary is not challenged. Therefore the prospect of Genghis Kahn being supported by genuine crossovers *or* raiders is not before the court. Candidates in this case must be presumed to be "of ... [their] political parties ... generally advocated or recognized in the news media throughout the United States" as provided in Wis. Stats. sec. 8.12 (1) (a).

integral part of the presidential selection process./[24] Whatever organizational advantages/[25] a party may gain by forcing these potential voters publicly to declare party preference — and there can be no other advantage to the Party/[26] — they are not of constitutionally cognizable stature.

Take the case of John Q. Public who ordinarily considers himself a Republican, but in a particular presidential election year finds himself supportive of Democratic policies and a candidate. Under Wisconsin law, this voter is free to select, and by his private vote does select, the Democratic Party as his party. The Party raises no objection to his support in the November election, naturally. But the Party forecloses the same voter from supporting the same candidate in the primary. In fact, however, this genuine crossover voter presents no more of a threat to a Party interest in the spring primary than in the general election. And his vote is equally precious to him in both instances. This voter impairs no interest of the National Party in selecting its nominee.

/[24]This is not to say that when a state has determined pursuant to article II section I that the facts and policies of the citizens are so served it cannot close its primary. *Cf. Rosario v. Rockefeller,* 410 U.S. 753 (1973), *reh. den.* 411 U.S. 959 (1973) (upholding party enrollment requirement). Appellees submit that a state may choose to include or exclude (within broad limits), but the choice is its to make in a presidential primary.

/[25]Compiling lists of supporters and nonsupporters for campaign, polling, patronage or other use has been suggested as an advantage to the political organization itself. *Nader v. Schaffer,* 417 F. Supp. 837, 848 (D.C. Conn. 1976), *aff'd mem.,* 424 U.S. 989 (1976).

/[26]Under Rule 2A voters are Democratic voters if they think they are and they say they are. The National Party does not set forth any objective standards against which a voter may test his or her self-designation or against which anyone else may test the voter's designation. Nor does the National Party set forth any subjective standards to guide

Most importantly, this genuine supporter of the Democratic Party and its candidate is the only crossover voter the National Party in fact disenfranchises. First, the raider unquestionably is not a threat in Wisconsin, and he or she would not be deterred by Rule 2A's declaration at the polls. There is no evidence of any appreciable number of unprincipled crossovers. In fact, all evidence shows those who crossover are genuine. *See* materials cited in footnotes 30, 31, and associated text. Further, an independent can hardly be considered a crossover at all. The Party's interest in disenfranchising this voter is reduced solely to its felt need to impose a loyalty oath. But it lies well within the prerogative of a state to promote voting and to secure voting rights to enable these voters to participate meaningfully at this critical stage of selecting a President.

Surely the person supporting the Party's candidate in November is as much an "adherent" as the one supporting the same candidate in the spring primary. One's vote, not a loyalty oath, makes him an adherent in the spring primary as well as in the fall general election. The National Party simply must confess that in truth it has nothing to fear from this voter.

The Party cannot successfully urge that it fears a different voter, namely, the one who will vote for a Democratic candidate in the spring but, his candidate not having won the nomination, will vote for the

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voters in determining their party preference. We could find no explanation by the National Party of who is a Democratic voter for purposes of voting in the primary except that a Democratic voter is a person who makes a declaration of Democratic party preference at the time of voting. We could find no explanation of what the declaration is supposed to signify or of what the voters are committing themselves to in making this declaration.

93 Wis. 2d at 500-01, 287 N.W.2d at 531, A-Ap. at 19a.-20a.

candidate of another party in the fall. In the first place, the Party has failed to show there are any appreciable number of those voters. Second, it has failed to show those who sign the loyalty oath will not do the same thing in the same proportion. Indeed, it recognizes that individuals who they concede are Democratic party members vote Republican when disappointed with the Democratic candidate./[27] Third, the argument employs an intolerable premise that anyone who supports the loser is not principled. There are two reasons why this is folly. First, only nationally recognized Democrats are permitted on the Wisconsin ballot, and they are backed by unquestionably principled Democrats. Wis. Stats. sec. 8.12 (1) (a). Second, a vote does not become principled only if preceded by a loyalty oath. The National Party's fetish with loyalty oaths simply will not deter the unprincipled. Thus, the Party need fear neither those who support the winning Democrat in the spring nor those who support the losing Democrat. Both candidates are nationally recognized Democrats.

Since the National Party's interests are not constitutionally jeopardized by principled supporters, it can prevail only if it can demonstrate a "substantial burden on First Amendment rights,"/[28] *i.e.*, significant raiding.

/[27]In the Party's 1978 report, for example, it was acknowledged that "some Democrats who are displeased with the outcome of the nomination process do not hesitate to vote for the Republican candidate for president." *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* 25 (1978) (Winograd Commission).

/[28]*Marchioro v. Chaney*, 442 U.S. 191, 199 (1979). *See also, American Party of Texas v. White*, 415 U.S. 767, 790 (1974) ("'absolutely no factual basis in support of their claims that ... [state statutes] imposed unduly burdensome requirements") (quoting lower court findings).

First, the facts extensively displayed in Section II. B. of the National Party's brief all relate to crossovers and not to raiders./[29] No hard or even reliable evidence of any raiding or other than insignificant and inconsequential raiding in Wisconsin is offered by the National Party. Indeed, virtually every serious student of the Wisconsin data has reached the same conclusion: there is none./[30] Recent experience in other states, although of questionable relevance in this proceeding, is in accord./[31] Unsupported fear of a harm for which there is only contrary evidence is no basis/[32] for curtailing the rights of all voters opposed to a public declaration of support for the National Party.

Indeed a careful analysis of the National Party's own materials as well as available research led the court below to the following conclusions:

/[29]Adamany defines crossover voters as "those who do not identify with the party in whose primary they cast ballots, all independents are crossover voters." D. Adamany, *Crossover Voting and the Democratic Party Reform Rules*, 70 Am. Pol. Sci. Rev. 536, 538 (1976).

/[30]"Although there is substantial crossing over, there is precious little evidence of raiding." *Id.*

/[31]*See* materials cited in Note, *The Constitutionality of Non-Member Voting in Political Primary Elections*, 14 Willamette L.J. 259, 282-86 (1978); A. Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 Am. Pol. Sci. Rev. 35-36 (1972); Note, *Primary Elections: The Real Party in Interest*, 27 Rutgers L. Rev. 298, 307, n. 74 (1974); *Developments in the Law — — Elections*, 88 Harv. L. Rev. 1111, 1172-73 (1975); Note, *Constitutional Issues in Durational Party Affiliation Requirements*, 25 Maine L. Rev. 147, 154 (1973). "Some have argued the Republicans 'raid' Democratic primaries. However, the existence of 'raiding' has never been conclusively proven by survey research." *Openness, Participation and Party Building Reforms for a Stronger Democratic Party* 68 (1978) (Winograd Commission).

> [W]e have not been presented with any factual basis to support the National Party's position that under the open primary statute, "Republicans, adherents of other parties, and independents would significantly affect the selection of the Democratic candidates."
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> Nor has the Party shown that the contemporaneous declaration of party preference is a necessary and effective way to prevent Republicans, adherents of other parties, and independents from voting on the Democratic Party ballot. Although some political theorists tend to support requiring a declaration of party affiliation to vote in a primary, it is generally recognized that in the real world in which elections are conducted the closed primary works in substantially the same way as the open primary.

93 Wis. 2d at 509-10, 287 N.W.2d at 535, A-Ap. at 27a-28a (footnote omitted).

Thus, the National Party has failed to establish that there is *any* adverse impact on its interests caused by Wisconsin's Open Primary. Equally unsupported is

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/[32]In *Williams v. Rhodes*, 393 U.S. 23, 33 (1968), this Court dismissed the State of Ohio's unfounded fears of multitudinous fragmentary parties as "no more than 'theoretically imaginable.' No such remote danger can justify the ... crippling impact on the basic constitutional rights involved in this case." (Footnote omitted.)

In *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 342, 125 N.W. 961 (1910), the Wisconsin Supreme Court commented on raiding as follows: "That any considerable following of one political creed will deliberately desert their own party at the primary to foist an unworthy set of candidates on a rival party presupposes a degree of moral turpitude that we cannot presume to exist."

the National Party's position that its Rule 2A is effective in meeting the purported problem even though it disenfranchises the majority of Wisconsin citizens. The Wisconsin Supreme Court concluded that "the Wisconsin open primary law does not impose a substantial burden on the associational rights of the party. Indeed any burden appears speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d at 536, A-Ap. at 29a.

The legal standard that the Wisconsin Open Primary Law must meet, therefore, is not the "compelling state interest" test. The "rational basis" test was applied in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. den.* 411 U.S. 959 (1973). There, New York had imposed a timely party registration requirement in order to vote in a primary. Upholding the law, this Court rejected the argument that the enrollment period was too long. The Court said the legislative choice was not "an arbitrary time limit unconnected to any important state goal." 410 U.S. at 760. Further, the Court accepted the appeals court's statement that "'the Constitution does not require that the state choose ineffectual means.'" 410 U.S. at 762, n. 10.

The Court applied the compelling interest test in *Cousins v. Wigoda.* There, however, Illinois' interest in securing the franchise of its voters was held not compelling "in the context of the selection of delegates to the National Party Convention." 419 U.S. at 491. Here, by contrast, the State leaves to the political parties the direction and control of the process to select the individual delegates. Stip., par. 19, Jt. App. at 27.

The Court also applied the compelling interest and strict scrutiny tests in *Kusper v. Pontikes,* 414 U.S. 51 (1973). Illinois, however had prevented a voter from voting for any party other than the one voted for in the most recent primary. In *Storer v. Brown,* 415 U.S.

724 (1974), the Court illuminated the reason for the rational basis test in *Rosario*. The law in *Rosario*, the Court said, was sustained "as '"in no sense invidious or arbitrary,'" because it was '"tied to [the] particularized legitimate purpose."'" 415 U.S. at 731.

Here, Wisconsin's law is tied to a particularized legitimate purpose. That purpose is to encourage voting by guaranteeing ballot privacy in party selection as well as candidate selection. The minimum necessary means to this end is to forbid Party registration and other forms of public loyalty oaths.

There is a further reason why the rational basis test applies. That is because Wisconsin is exercising its own constitutional right to set the qualifications of voters in the selection of candidates in primary elections, and this constitutional right is at least of equal dignity with the associational freedoms of the political parties. The Court has used the rational basis test even in the context of infringements on first amendment freedoms where the state is exercising its own constitutional rights independent of its general police powers. In *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld liquor regulations in the context of sexually explicit entertainment in bars and taverns. The Court admitted that the entertainment did not violate its standards on obscenity. 409 U.S. at 116. It further conceded that the regulations addressed conduct "within the limits of the constitutional protection of freedom of expression." *Id.* at 118. But the critical fact was that the twenty-first amendment granted power to states relative to control of alcohol above and beyond ordinary police powers. *Id.* at 114. The rational basis test was applicable, therefore. *Id.* at 116.

Another illustration that the rational basis test applies where state interests unique to a democracy are involved is *Foley v. Connelie*, 435 U.S. 291 (1978). There, the Court upheld New York's law excluding aliens from positions as police officers notwithstanding precedent that alienage is a suspect class requiring strict scrutiny and a compelling state interest. Peculiarly democratic interests were being asserted by the state. The Court's holding was "no more than recognition of the fact that a democratic society is ruled by its people." 435 U.S. at 296. "[T]he right to govern is reserved to citizens." *Id.* at 297. Accordingly, it was rational for New York to exclude aliens from its police forces.

Here, as in *California v. LaRue,* Wisconsin asserts a specific constitutional right under United States Constitution article II to determine who may vote for President in the primary. Further, as in *Foley v. Connelie,* Wisconsin asserts the fundamental interest of a democracy to maximize voter control over the selection of officials. According, the rational basis test applies.

Wisconsin's law advances the interests of all its citizens to vote/[33] privately/[34] unencumbered by a loyalty oath, facilitates its uniform practice in the spring election of having only non-partisan judicial and local elections,/[35] and represents widespread and

/[33] *Williams v. Rhodes,* 393 U.S. 23, 30 (1968) ("[T]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively"). *Lubin v. Panish,* 415 U.S. 709, 716 (1974) ("[V]oters can assert their preferences only through candidates or parties or both.") *See* sec. II, *supra.*

/[34] Privacy of political preference is "fundamental in a free society," and the advent of the secret ballot is "one of the great political reforms." *Buckley v. Valeo,* 424 U.S. 1, 237 (1976) (Burger, C.J., concurring).

/[35] *Developments in the Law — — Elections,* 88 Harv. L. Rev. 1111, 1212 (1975). *See also* description of Wisconsin's extensive non-

overwhelming popular support for the law subsequent to years of articulate public debate on the issues, and an electorate that votes overwhelmingly on the basis of principled support for the candidate it wishes to lead the country./[36]

The court below/[37] carefully weighed these and related interests/[38] and concluded that "any burden imposed on associational rights by the open primary law is minimal and is justified by Wisconsin's compelling and substantial governmental interests." 93 Wis. 2d at 515, 287 N.W.2d at 538, A-Ap. at 32a. This conclusion, based on the facts and law marshalled by the lower court, recommends itself by its logic and basis in law. Additionally, the rights of voters privately to associate and vote is enhanced, and the National Party's exclusionary rule is constitutionally diminished by Wisconsin's decision on how to exercise its article II section 1 authority.

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partisan spring elections as they relate to the state's system of discrete fall (partisan) and spring (non-partisan) elections. 93 Wis. 2d at 513-14, 287 N.W.2d at 537, A-Ap. at 31a.-32a.

/[36] [M]ost of the crossovers temporarily deserted their party to register their special approval of a candidate, or a policy associated with a candidate, available only in the other party. [Eugene] McCarthy's Republican supporters clearly did not vote for him because they thought he would be the easiest Democrat for Nixon to beat in November; they did so because they liked him and his opposition to the Vietnam war.

A. Ranney, *Turnout and Representation in Presidential Primary Elections,* 66 Am. Pol. Sci. Rev. 35 (1972).

/[37] Where the operation and impact of a state law is determined by the highest court of a state, additional deference to its conclusions is warranted.

/[38] The interests of the State of Wisconsin were identified in the court below as:

> The state's interest in maintaining a primary and in not restricting voting in the presidential preference

IV. Recognizing The Legitimate Role Of The States In Determining Qualifications To Vote For President Need Not Preclude Party "Reform" Or Emasculate A National Party.

The National Party, in defense of its "reforms,"/[39] raises the spectre of a National Party unable to select its members, define its policies, or administer uniform national rules. Only the latter might be affected by the law of this case and probably only in a minor way.

The National Party will still be able to set whatever membership qualifications it desires and define its policies through its internal decision making processes such as convention platform writing. Only party members under Wisconsin law may participate in that matter./[40] Such mechanisms as requiring its nominee to adhere to certain principles (or indeed the entire platform) appear to be reasonable internal rules a party could consider. The political likelihood of closed primary states becoming open is remote. Only if a state could marshall the legislative and executive

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primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot, thereby ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner.

93 Wis. 2d at 512, 287 N.W.2d at 536, A-Ap. at 30a.

/[39]There now appears to be growing questioning of how many of the current "reforms" need to be reconsidered, refined, or abandoned.

/[40]*See* footnote 7 and associated text.

power needed to change its law,/[41] had no history of raiding, had evidence of principled candidate selection by voters able to choose, and had broad legislative and popular support could a state make the instant kind of showing in support of its open primary. Moreover, even fifty states with Wisconsin's law would not impair the Party's interest. A right of voting privacy does not conflict with the Party's right to select delegates.

Therefore, while the National Party may need only address an open primary in one of the fifty states and has alternate, less intrusive means available to meet its objectives, the State of Wisconsin has no alternative to the course it has taken to its goal. The only way effectively to secure privacy is to foreclose public declaration.

To effectuate the will of its citizens it could do no less.

In the real world, it is not credible to assert that a closed primary will not intimidate voting. As stated by Jack Mabley writing in the *Chicago Tribune:*/[42]

> Many Illinoisans don't vote in primary elections because for personal or business reasons they don't want it publicly known whether they vote Democratic or Republican. Our primary system makes a mockery of the so-called "secret ballot."
>
> If you're a Democrat in a heavily Republican area, or vice versa, you'll know what I mean.

/[41]Only Wisconsin now has by law an open primary, the results of which determine presidential candidate strength to be represented by delegates to the national conventions.

/[42]J. Mabley, *Wisconsin Has the Primary Idea, Chicago Tribune,* March 30, 1980, sec. 1, at 4, col. 5.

In Wisconsin they have a true secret ballot. The voter is handed ballots from both parties. In the secrecy of the booth he or she votes one ballot. The other is discarded.

Illinois politicians want to keep the closed primary, of course, so they can keep tighter control of the electorate.

CONCLUSION

The judgment of the Supreme Court of the State of Wisconsin should be affirmed.

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